



STATE OF INDIANA

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March 8, 2016

Mr. Seth Slabaugh
345 South High Street
Muncie, Indiana 47305

Re: Formal Complaint 16-FC-23; Alleged Violation of the Access to Public Records Act by Ball State University

Dear Mr. Slabaugh:

This advisory opinion is in response to your formal complaint alleging Ball State University (“BSU”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 et. seq. BSU responded via counsel, Mr. Séamas Boyce, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 4, 2016.

BACKGROUND

Your complaint dated February 4, 2016, alleges Ball State University violated the Access to Public Records Act by improperly denying your records request.

You requested copies of emails related to BSU president Dr. Paul Ferguson. Your request for emails was for a period from December 1, 2015 to January 25, 2016. This request listed 26 key words to use as search terms. On February 3, 2016 you were informed there was one document responsive to your request. However, BSU chose to invoke the deliberative materials exception citing Ind. Code § 5-14-3-4(b)(6). You believe this denial is improper.

On February 22, 2016 counsel responded. Counsel asserts the exemption was properly invoked because the email was maintained within the president’s office and is speculative in nature. The correspondence was between the president and his senior advisor and contained deliberative communication for the purpose of decision making.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and

employees, whose duty it is to provide the information.” *See Ind. Code § 5-14-3-1*. Ball State University is a public agency for the purposes of the APRA. *See Ind. Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy BSU’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Ind. Code § 5-14-3-3(a)*.

The General Assembly has provided that records which qualify as deliberative materials may be disclosed at the discretion of the public agency. *See Ind. Code § 5-14-3-4(b)(6)*.

The subdivision provides:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Consider the following from *Opinion of the Public Access Counselor 14-FC-201*:

Deliberative materials include information which reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be inter-agency or intra-agency records, which are advisory or deliberative and are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17*.

The deliberative materials exemption is indeed broad but can be subject to abuse. Some have called it the exception which swallows the rule. While the majority of communications between public employees may be deliberative, the nature of the APRA does not give a public agency license to make an inherent inference or a presumption that this is the case. BSU has not invited this Office to review the email *in camera* in order to determine the propriety of this exception but they are not required to do so. Therefore, I cannot state definitely if the exemption was invoked properly. Only a trial may make that determination. However, if the email contained deliberative material, BSU has not violated the Access to Public Records Act.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that Ball State University did not violate the Access to Public Records Act if the requested information met the definition of Ind. Code § 5-14-3-4(b)(6).

Regards,

A handwritten signature in black ink, appearing to read 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Séamas Boyce, Esq.